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## The Continuity of Government: Colloquy

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# THE CONTINUITY OF GOVERNMENT

## COLLOQUY

JUDGE UGAST: I am certainly enthralled by just listening to the presentations that have been made this morning on a subject that is so sensitive, important, and urgent to the Nation. It's so important, as I believe Dr. Ornstein said here. At times over the past history of the country, we have taken our time when trying to resolve issues where there has been some vulnerability. But we are living in different times. I think the urgency is something that all of us are concerned about and that's why these discussions are so important. Before we start with questions, I thought maybe it would be helpful to see if there is an exchange between the members of our panel, amongst themselves, and then we'll turn it over and ask the audience to give their reactions or questions.

JOHN C. FORTIER: I've got a question for Howard Wasserman. I really liked Howard's presentation, especially laying out the different time frames for reconstituting the Congress—the very short term, the intermediate, and, ultimately, the permanent reconstitution. But in the discussion of the short term, he proposes a change that would allow Congress to operate with very few members, many fewer than a majority. You suggested that there wasn't too much trouble that a House could create. Most notably, it couldn't pass legislation without the Senate. There's one part that really troubles the Continuity of Government Commission, and that is the intersection between the Presidential Succession Act and the continuity of Congress, especially in light of a small House of Representatives. If somehow you got Congress to reconvene twenty members, fifty members, or one hundred members, and the President, the Vice President, and Congressional leadership killed, those twenty members could elect somebody who would become President of the United States, who would rule for the rest of the term. Does that concern you? Would you limit that, or would you only suggest this in concert with some other reforms in the Presidential Succession Act?

HOWARD WASSERMAN: In making the proposal, I'm assuming a change in the Presidential Succession Act. I'll jump ahead to that and come back to a couple of specifics. There has to be a provision put in place for special Presidential elections whenever Section 19 is triggered. Section 19 is the Presidential succession statute, and it deals with someone in a position below the Vice President becoming the acting President. If the Vice President becomes President, we end there. Harry Truman did a fine job for seven years as President. But if Paul O'Neill, Colin Powell, Donald Rumsfeld, Dennis Hastert, or whoever, were to

become acting President under the statute, the statute should provide that a special election to elect a new President and Vice President should be held within a fairly expedited period. I think six months is workable, and if we are choosing a President and a Vice President, we have to go through the electoral college mechanism. Back to John Fortier's question, what such a special election provision does is alleviate some of the concerns. I am troubled by a forty-person House of Representatives picking a Speaker and that Speaker becoming acting President for a long time. I think the special election provision mitigates that. Although I agree that we need to get the legislative officers out of the top of the line of succession, the one thing we have to consider is the possibility of the President, Vice President, and every single Cabinet member, including any special successor provision that we create, being killed in the attack. Now we are in a situation where the only way we can repopulate the executive branch is to go through Congress first. So let's leave a mechanism in place where even a small Congress can pick a Speaker, the Speaker can act as President, and we can cap how long that individual could act as President by requiring an election.

EXCHANGE BETWEEN JOHN C. FORTIER AND HOWARD WASSERMAN: Realistically, it could be six to eight months. The entire Presidential election is going to take time. I envision the alternative to be no President at all or no one in the White House at all. I am talking about everyone in the line of succession past the Congress. I would like to see the Speaker and the President removed from the top of the line of succession. I assume there would also be a legislative change that would take place.

JAMES HO: I'd like to follow up on the problem that everyone's pointed out. Everybody in the line of succession lives and works in the Washington, D.C. area. That's absolutely an issue. Norman Ornstein mentioned the idea of setting up a special office or series of offices for the post of Presidential successor, or some other office to that effect. That's an interesting idea. Let me offer a potential political constraint, which is that I'm not aware of any member of Congress who is interested in doing that. I'm also aware of some who are quite opposed to that idea. If we don't do that, do you have any alternative suggestions for solving this problem?

NORMAN J. ORNSTEIN: Well, certainly, one way is to locate a Cabinet office out of Washington, D.C. I think you'd find a fairly significant interest in that idea, although there are problems. You wouldn't find any Cabinet officer interested in doing that because once you lose the proximity to power, you lose something that's very considerable. Another way is to make sure at any given moment that one of those Cabinet officers is out of town; this could be done informally. The third

alternative is simply to expand the line of succession to include another group of people. One of the first things that we thought about after September 11th was that we could just add governors at the bottom of the list. Now you can do this through some decision rule. The problem is every decision rule that you pick along those lines contains deep flaws. Let's assume you pick governors on the same basis as we do in the Presidential Succession Act. The line of succession selects from the Cabinet members in the order of the creation of their office. So, in order to do it in order of the creation of the state, we make the Governor of Delaware the person who is next in line.

RANDOLPH D. MOSS: There's probably one person who will agree to that proposal.

NORMAN J. ORNSTEIN: Well, there are probably two people, the Governor and the Lieutenant Governor of Delaware. You could do it on the basis of the size of the state, which is a most powerful argument. An argument against that would just say two words: Gray Davis. You can no longer say just two words, Arnold Schwarzenegger, because he's ineligible to serve. As of the moment, I think we may see another constitutional amendment to deal with that problem, but we're always going to get some people who are probably not particularly appropriate. You could also perhaps have a President with the ability to pick three or four governors as potential successors. Now, how could governors be officers of the United States? That's another issue. But if the President swore in governors as heads of state militias, they are then officers of the United States and could serve in that particular role. I don't find any of those particularly edifying ways to go, and I don't want to get into an automatic decision rule. Frankly, I think having an automatic decision rule troubles me because the Cabinet would choose the President from its own members. In a group of roughly a dozen people, you are going to find a half dozen who have none of the basic qualifications you would want for a President of the United States. They are not chosen for that purpose. No President chooses a Cabinet because people have a breadth of qualifications. Just pick some positions. It's hard to find a Secretary of Veterans Affairs. Occasionally, you would find a Secretary of Education. Rarely can you find a Secretary of the Interior. Some of those particular positions are usually chosen because of geography or a narrow area of expertise. So that's one problem. The political difficulty of having some opposition by members of Congress and not having visible support are the kinds of issues we are going to have to address. I don't see any other way.

RANDOLPH D. MOSS: Let me just play devil's advocate for a moment on the question of keeping the leadership of the House and Senate in the line of succession. Those individuals, in contrast to the hypothetical

Cabinet members that you were talking about, are people who by and large would have a broad experience dealing with the most important issues in the Nation. These are people who hold elective office, which is of some benefit as opposed to being appointed. I think they are people who by and large are more likely to be qualified to discharge the duties of the Presidency than most folks out there. There are a couple of reasons why one might not consider including the leadership of the House and Senate in the line of succession. One is the constitutional issue that has been raised. That issue is one for which fair minds can disagree. It is not an ironclad argument one could give where the word "officers" would be used in different senses in the Constitution. Some of the fixes one suggests to avoid that problem raise constitutional issues of a similar magnitude. If you question, for example, whether one could simply create an office in which the only duties of the office were to be available to succeed the Presidency, I think it is a question of whether that is an office in the constitutional sense or whether there would have to be some other duties involved. The question of governors and the militia, whether in fact you are an officer of the United States when the militia is not federalized, would be a question of a similar magnitude. The question would exist in that context as well. There is also the issue you raised yourself, which is that many Cabinet officials really are not best suited to discharge the duties. Some are, but many are not, and so why not leave it that way. I think there are many issues concerning the ability of the Speaker to bump a Cabinet official and exercise power in that fashion. But why not leave the Speaker and the President pro tem in the end of the line of succession?

JOHN C. FORTIER: Of course, I think the obvious point you made is a distinction between the President pro tem and the Speaker. I think your arguments are stronger with respect to the Speaker of the House, who is elected by a majority of the majority party or by the caucus of the majority party, who is a national figure of sort, and who is probably as prominent or more than the top four or five Cabinet members. You could argue that those people are probably the most qualified people. I have some issues with this as well. What we try to point out is that on the question of competence of a Presidential successor, it may not be the worst situation to have a Speaker. But when you get into some of the other issues, however, you have some pretty significant conflicts of interest between branches that make Cabinet succession better for continuity of government. In the shift back and forth between an incapacitated President, a Secretary of State, or an impeachment issue, for me, those things scream out even more for Cabinet succession. I come down on the side that Cabinet succession is better overall, but the Speaker is not an insignificant figure.

NORMAN J. ORNSTEIN: Let me just raise a couple of other issues. I really do believe that a President ought to have some significant say in successors where you have a vacancy that is caused by some catastrophe. We would basically embrace the idea that a President chooses the Vice President, and it really is an individual choice that's ratified by the party and certainly ratified by the electorate. It is a choice made by the President at that level of succession. I would find very troubling the idea that you could have somebody representing a radically different policy perspective going from the Bill Clinton to a Newt Gingrich, being the one recent example, or going from a Ronald Reagan to a Tip O'Neill. The President pro tem is a completely different issue. The President pro tem is a constitutional office, but a majority leader of the Senate is not constitutional, and the Speaker of the House, of course, is as well. That's mentioned in the Constitution, but the custom is that the President pro tem is the most senior majority member of the party, which, practically speaking, means the oldest member. Somebody was pointing out yesterday that the American people got sort of a vivid vision of this situation when Nixon was President because there were pictures on news magazines with Nixon giving the State of the Union message, and behind him was John McCormick and Carl Hayden sleeping, which didn't inspire great confidence. Speaking of incapacitation, we had Strom Thurmond in that post for a number of years, drifting in and out as he was in his final years. The Senate could decide to change its way of selecting a pro tem, which is not an honorific role for someone who is the most senior member of the majority party and entitled to the limousine and extra money. Some members of Congress, including Brad Sherman of California, have proposed including the congressional leader of the same party as the President, either the Speaker or minority leader of the House and either majority or minority leader of the Senate. But then you reach that constitutional question as to whether it is constitutional to include congressional leaders at all in the line of succession. I think there's a strong case for moving them out. However, I would argue that there is a very strong case on continuity issues to include figures outside of Washington in the line of succession to really get a geographical disbursement. If you require a Senate confirmation for these officers outside of Washington, you will not get a President to pick a group of cronies. You are going to have to get through that filter. More broadly, President Bush, for example, could choose his father to be in that line of succession, which is perfectly fine, or choose a series of other secretaries of state from the past, existing governors, or additional former statesmen; he might pick Jimmy Carter to be in the line as well. There is some level of confidence in the country, and you'd have to deal with those constitutional issues of making sure the term "officer" meant something.

But it's worth considering. I think part of the reason that members of Congress are not embracing this idea is that most members of Congress have not spent three seconds thinking about the issues of Presidential succession at this point in time. So if we can get more of a dialogue about this issue going, we would be okay.

JOHN C. FORTIER: I guess I worry about the problem that people either haven't thought about it, or that they think that these positions outside of Washington, D.C. would be insubstantial. As Randolph Moss hinted, they might just be figureheads. To get around that problem, you have to create a balance because you don't want to create too many dignitaries who will then come to Washington, D.C. On the other hand, creating some positions that would have some pep to them might give people more confidence in the proposal.

HOWARD WASSERMAN: I think there are a couple of aspects that would be problematic and a couple things you can do. You can make the position outside of Washington, D.C. This role would be, for lack of a better word, an advisor, but you keep somebody very much, to coin a phrase, in the loop. They are involved via a secured phone line in the weekly Cabinet meetings. They are fully briefed by the President and by other Cabinet members; they know what's happening. That's important as a practical matter. Putting aside whether or not they are officers, that's important as a practical matter to avoid appointing a total stranger, which I think is the problem with Congress. A couple of problems that you run into with governors, not as a matter of federal constitutional law, but as a matter of state law, is that one has to look to what state constitutions say on governors and other high state officials holding office in the Federal Government. So that's just something that may be a practical concern with states, or would states overturn that? They might, but that's just something as practical consideration.

RANDOLPH D. MOSS: Listening to the conversation, it occurs to me that the position that is being described sounds very much like the Vice President's position. Another consideration is that the Vice President only needs to be in Washington, D.C. for the purpose of casting deciding votes before the Senate. The good question would be whether in fact the Vice Presidential residence should be moved elsewhere.

NORMAN J. ORNSTEIN: Perhaps the Vice Presidential residence could be moved to Graceland or another undisclosed location. Actually, if you think about it, Cheney aside, the difference between this position as Howard Wasserman has articulated and the Vice Presidency is that no position would be in the loop.

MODERATOR JUDGE UGAST: Well, seeing and hearing the panelists talk with each other has helped us in terms of some of the issues and how they play out. Later on, I'd like to hear a little bit about the political

equation in all of this, how it seems to be shaping up on Capitol Hill, and if there is an undercurrent yet, bipartisan or otherwise, on some of these issues. But let's first hear from the audience.

#### QUESTION & ANSWER SESSION

*Question:* Mr. Moss, you expressed concern about an acting President or a non-elected President appointing Supreme Court Justices. I was wondering what you thought about creating the kind of situation where the acting President will appoint Justices for a limited amount of time, like only for his term, kind of like a recess appointment?

RANDOLPH D. MOSS: I think that is a very interesting thought, and that it is mostly a matter of policy. My reaction is that your suggestion probably makes some sense because I think that an unelected President appointing Justices of the Supreme Court is troubling because although the Court is a non-political institution, it is a part of the structure of our democratic government. The democratic process does influence the selection of the members of the Court. Presidents have some influence on the direction the Court takes through selection of members, and the Senate has some influence through the confirmation process. I think the only drawback to what you suggest is that it would require a constitutional amendment. The question is whether there are other mechanisms short of a constitutional amendment that could achieve the same sort of objective.

HOWARD WASSERMAN: Any time an acting President assumes the White House under that statute, a special election must follow. A special election will alleviate some of the concerns with Supreme Court appointments. If the acting President is only going to be there for five months, then that President should make appointments within that time frame; so seven months from now we are going to get those Supreme Court appointments. Therefore, we would deal with a much smaller problematic time frame.

RANDOLPH D. MOSS: Well, actually thinking about this for a minute, in some sense there already is a mechanism in place that might allow that to work without a constitutional amendment. If there was a constituted Senate, the Senate could always just decline to confirm the nominees of an acting President on the grounds that they don't come with the sort of the public approval, in which case that acting President then would not have the option of making a recess appointment that would get to the result you suggested.

*Question:* Would you comment on the likelihood of substantive and political success on these issues, given that most members of Congress seem to be acting with a sense of invulnerability rivaled only by the sixteen year-olds of our nation?



NORMAN J. ORNSTEIN: I think it is going to be a while before we achieve any success on this issue. A part of the reason is we now really do have people engaged in both Houses, although it is kind of an oddity that we are getting much more interest and involvement by Republicans in the Senate and a real resistance to action by Republicans in the House. At the same time, we have not gotten the leaders in either House or in either party engaged at a level of moving these things higher up on the agenda. It's one of the more disillusioning things for me because the leaders really do have the fiduciary responsibility to think about these things in a way that rank and file members are just never going to do. The four leaders have pretty much stayed on the sidelines even though they know about these issues and members of the commission have met with them all and handed them copies of the report. Now, I should mention that it is not that they have this great sense of invulnerability. Just a week ago the Senate and a very large number of staffers went through an exercise, almost a war game, of going out to Fort McNair, where they've now set up an alternative meeting site. Frankly, an alternative meeting site at Fort McNair, which is about a mile and a half from the U.S. Capitol, is likely inadequate given the possibilities of attacks that would make the entire area uninhabitable for a long period of time. One of the great embarrassments in the House of Representatives was during the anthrax scare. During this time period, members of Congress were in panic and left in the middle of the session with a fair amount of work on the table. The Senate kind of sniffed at this and said well we are still here, which really annoyed the House. This reaction by members of the Senate demonstrates what little concern they had with the problem. Now, however, they have begun to look at alternative meeting sites. Basically, they have much more of a plan in place for how to evacuate the Capitol if something happens. Two things must happen for it to really move in these areas beyond the great work that John Cornyn has done. We have others in the House like John Larson, who is the ranking Democrat on the House Administration Committee. The leaders have to become engaged, but it is also important that the level of public interest increase. I absolutely believe that if a hundred members of Congress were confronted by their constituents at town meetings with this issue, Congress would have a very different attitude. When I traveled and spoke with people out in the country, I received two reactions. First, many individuals did not even recognize that a problem exists. Second, and among those who recognize that a problem exists, they question why something has not already been done.

MODERATOR JUDGE UGAST: Well, at least with this particular issue, it seems to me that the urgency in the minds of people around the country is likely to rise to a higher level.

JAMES HO: Just to follow up on the political issue of how likely this reform could get enacted. Unfortunately, you have a classic political situation in which there seems to be relatively broad consensus that the current situation does not work and that we need to do something, but there are two competing solutions and each side essentially has a blocking position. The result is that everyone agrees that the current law is inadequate, but nothing will change because we cannot agree on how to make those changes.

*Question:* What is going on outside of the D.C. area, and how are we preparing for the scenario that Dr. Ornstein just described? What procedures do we have in place? The panelists have talked about a shadow government, and leaders in the line of succession being placed in an undisclosed location. If these proposals are not passed into law, where would we stand if something were to happen tomorrow?

NORMAN J. ORNSTEIN: We know this: we know from a variety of news reports that the administration has a shadow government plan in place. However, this plan addresses the problems associated with the problems that arise if Cabinet members and the political officers below them are lost in an attack. This plan ensures that there is somebody in the line of succession who can act, so that we would have some official who can authorize signatures on Social Security checks; make sure that our transportation system operates; and can issue decrees in the light. The way in which we have done that is to take a group of senior civil servants from each of the agencies and departments, approximately 100 people, and rotate them in and out of a location outside of D.C. for a week or so at a time. The reason this issue became public is because the children of these people began to ask where their mothers or fathers were for a few weeks, so the word got out. This plan I have just discussed does not solve the particular problem of how to get alternative meeting places for Congress. The Constitution says neither House can meet in a place other than its designated spot without the other House agreeing to it. We talked about getting a general provision in place at the beginning of each Congress, which would essentially be a blanket authorization allowing each House to meet somewhere else if one of the Houses goes down and the other has to find another place to go. However, Congress has not dealt with these larger issues. The attitude I find from some members of Congress and from a few people from out in the country is: we will get by, somebody will take charge, we will fill the vacuum and then we will worry about it later. That's a fairly widespread attitude.

HOWARD WASSERMAN: If you go rent the movie *Mars Attacks*, at the end of the movie the President's 16-year-old daughter assumes the leadership position.

*Question:* Given the stakes here, and given the constitutional questions you have raised, is there a consensus in the panel that a constitutional amendment is only part of the solution to the problem?

JOHN C. FORTIER: The different branches have different remedies and we as the Commission have issued recommendations on succession, but we did come to the conclusion that for the continuity of Congress that a constitutional amendment is necessary. What one does short of this amendment is some small tinkering around the edges, which might help here and there. For example, rule changes where the House is called back into session if the Speaker happens to be killed. However, these measures are really inadequate.

NORMAN J. ORNSTEIN: By the way, Brian Baird came to the conclusion—and I think I agree with it—that you don't need to have a constitutional amendment ratified. You just need to get it through both Houses of Congress and out to the states because then in the event of a catastrophe, the states can ratify it just like that. However, if you do not get it through Congress, then of course you have a much bigger problem on your hands and it would be one that probably could not be dealt with. The other mechanism for making a constitutional amendment is going to be more cumbersome even than going through an expedited special election process.

JOHN C. FORTIER: Although, you need some implementing legislation that would have to pass in advance of the law.

NORMAN J. ORNSTEIN: Yes.

HOWARD WASSERMAN: I think Mr. Ho might be able to speak more to this, but as a matter of practical politics, what you're going to see is tinkering around the edges and some things that may be of somewhat dubious constitutionality on the assumption that if the worst happens and this is what we do, everybody basically will accept it. Nobody will question it, which may be fine if you are not concerned with being an absolute purist. The problem is that the same people think that we will get through this and this will be acceptable in the worst case. Unfortunately, this reaction leaves us without the steps necessary, such as amending the Constitution, which ensures that we truly are doing things the right way.

MODERATOR JUDGE UGAST: Mr. Ho, did you want to make a comment on that?

JAMES HO: Look at what the House Constitution Subcommittee did in 2002 when they held their hearing. Their ultimate conclusion was that, in the end, so what if the elections don't work, because we don't have that

much time. The process takes too long to reconstitute Congress, so we will have martial law, but that's okay. So, I think that's the question. We can do a lot by legislation or by rulemaking to address certain kinds of occurrences. We can't with regard to other kinds of occurrences, and so the question is how comfortable are you with the likelihood that those issues which cannot be addressed will result in martial law. How uncomfortable are you with that? If you are uncomfortable, then you have to be for a constitutional amendment; but if you don't mind that so much, then you believe that we don't need one.

*Question:* Dr. Ornstein had mentioned a shadow government coming in—the importance of having somebody to fill those functions like signing Social Security checks. What about the function of the Commander and Chief of civilian oversight for military? Signing a social security check is one thing, but if September 11th happens again, or if a terrorist attack is ongoing and requires immediate mobilization of military force, what kind of mechanisms are currently in place if there is a giant vacuum in the current line of succession?

NORMAN J. ORNSTEIN: When you talk to people in the White House there are a lot of things they can't talk about. They say they got a lot of contingency plans in place and there are things that are there. I'm sure some have been dealt with by the President, but certainly the shadow government will also include a senior civil servant from the Department of Defense who would have the same authority vested in that person as the Secretary of Defense to provide at least that nominal civilian control over the military. Is that adequate? No.

JOHN C. FORTIER: Two things to add: one, if you go back to the case of Reagan's shooting, if you heard the transcript of some of the things that went on in the White House that day, there was real confusion about this, not only on Al Haig's part, but because Vice President George Bush was out of secured communication. He could not be asked anything classified. You wouldn't want to be overheard. As a result, there was this group of Cabinet members in the White House, including the Secretary of Defense, feeling like they have command control. The Secretary of State is saying I am the most senior Cabinet member so I should have control. This example demonstrates how the system may be affected in the event of a minor disaster. The second thing I want to add is that your question points to another situation where we might need someone to act as President very soon after an attack. This raises a whole bunch of other questions concerning response mechanisms. Because of complete confusion, you don't know who is around, and what the line of succession is, and at the same time, the system wants to find somebody immediately to answer these questions. Yet, if someone takes control now and then the person who should be in charge appears, what

should be done. How does one resolve this, and do these examples demonstrate the potential for some sort of power struggle?

*Question:* The conversation has primarily been talking in the context of a national catastrophe, and I guess I would like to kind of direct this question to Mr. Wasserman and Mr. Ho. I am wondering about the possibility of provisions being put into place to make sure that national catastrophe is the only time where the formal requirements of control may be relaxed, and the seats of incapacitated members be taken advantage of. Otherwise, I can imagine instances where individuals would try to abuse these provisions for political reasons.

HOWARD WASSERMAN: Mr. Ho, could you talk about the specifics of the pending bills?

JAMES HO: Sure. I think it's a great point. The bipartisan Continuity of Government Commission was pretty clear in saying that, whatever mechanisms are put into place, they should be limited to emergency circumstances. I think that goes to your point. The question then of course becomes how we define emergency circumstances. I think on that issue, opinions vary and the various proposals vary. Congressman Sensenbrenner's proposal triggers emergency circumstances when one hundred vacancies exist in the House; Senator Cornyn's constitutional amendment would be triggered if one fourth of either the House or Congress is killed or incapacitated. Another issue is the establishment of a procedure for declaring a member incapacitated for the purpose of filling their seat. You could see a politically opportunistic situation where I, as one Senator, may say you're incapacitated, and now your governor, who is a friend of mine, is going to appoint your successor. One way to deal with that problem would be to consider legislation that says anybody who is temporarily removed because they have become incapacitated has the right to reclaim their seat at will, as long as they can say they are fine. I think that is one way to reduce the potential for opportunism.

HOWARD WASSERMAN: There is also, I hope, a way to swing some of the concerns of people on the House side who want to insist that appointments are inappropriate in the House because it would change the fundamental nature to say, look it's temporary and it's an absolute emergency situation where a quarter or a hundred or half of the House has been killed. If we are only talking about five vacancies we could wait 120 days or so for the election to happen, and I think the fact that it is only for emergency situations, I would hope, would kind of address some of those concerns.

NORMAN J. ORNSTEIN: Let me just add a couple of things. One of the other knotty issues here is who decides when you reach the threshold, and you can't just leave that sensible issue in the hands of the Speaker of

the House. There might not be a Speaker of the House. One could see how political circumstances or dicey circumstances arise. If you have an attack on the Capitol, it could be like in one of these earthquake situations where you might have a significant amount of people missing and it is not clear whether they are alive or dead, and if you let the Speaker declare a seat vacant and then you hold an election to fill it, you may not find somebody for days or weeks and then they find that you are already well on your way to replacing them. So some of the decision making process must be handled in a neutral manner. I would side with Washington and depoliticize it as much as possible and one of the things we put out there early on was that if you have some kind of a catastrophe the governors in each state would canvass the state on state delegations and if the governors determine that half a certain number of members of the state delegation were dead, missing or incapacitated, that governor would issue a proclamation. When you have a majority of the states with proclamations, then you would trigger any of these provisions for temporary appointments and the like, so you spread it out around the country and you take it out of the hands of a single individual who then could not have an ability to manipulate the system for his own purpose.

*Question:* I was wondering, what do you think about the obligation on the former Speakers, like Foley and Gingrich, which is to allow members to elect someone that they would eventually run with who would take over the seat?

JOHN C. FORTIER: Speakers Foley and Gingrich are actually members of our Commission and that editorial you saw was written before we formed our Commission. Much of what they said we think had some merit. I have to distinguish a couple different parts of the provision. One, I think some original suggestion was that you could do this by a House rule and it wouldn't require a constitutional amendment to do this. The Commission recommended that you would need a constitutional amendment, but to have some sort of temporary appointment. We considered the use of a governor to make the appointment. Norm Ornstein wrote a piece in *The Wall Street Journal*, and the Speaker of the House in the Delaware Legislature wrote to us to explain Delaware's provision for temporary appointments. No successor to a legislator appears on the ballot, but once a state legislator is elected in Delaware, they write down three to seven names, and they submit this list to the clerk stating that these are his or her legislative successors. This process gets around the question of a governor appointing somebody of an opposite political party. Under this appointment process, the successor would presumably be someone that the now deceased member would be comfortable with, as they could nominate somebody in the same party or someone with similar ideological beliefs.

We actually thought of a slight modification of the Delaware system, which was that you could combine the two methods previously considered. A legislature would write down a list of names, and when the legislator had died in a mass attack, the Governor would look at that list and select a predecessor from among the people listed. The only problem with this method is it sounds a little odd, as a current congressman could hand down his seat to someone else, his son, wife, relative, but as a practical matter, it avoids the problem associated with political selections. It is something that can be done very quickly and would have some legitimacy.

NORMAN J. ORNSTEIN: The House Judiciary Subcommittee of the Constitution did hold one hearing on this issue and that was it. The issue was then put aside. During this time, individuals began acting like young kids. A number of members expressed their initial thoughts on having their governor pick their replacement. My response to their concerns was: first, you'll be dead, but the second was that under these dire circumstances, even your governor, who you don't like, is going to rise to the occasion and act like a statesman. But the fact is you can't remove the political environment from people who are going to be making decisions about their own legacy or their own futures and you have to be sensitive to some of these things and that's why we weigh these notions of giving the members some ability to get involved here. There is some surface allure to the idea that you run on a ticket with another person and then the system has a level of legitimacy, but there are also such practical difficulties engaged with this concept including the cumbersomeness of it. Another possibility is the direction Senator Cornyn is going, which is to use a constitutional amendment. Also, John Larson in the House proposes to let the states figure out how they will handle the succession issue. It does not have to be a governor. It could be a state legislature; you could give the responsibility to the legislature, but also put in a time frame that if they don't pick a successor within X days then the governor may make the choice. Or the legislature may do as Delaware and other states have done and allow the possibility of having designated successors. Leaving these sorts of issues to the states has a lot of appeal.

*Question:* I was just curious as to the level of the administration's involvement—either with the Continuity of Government Commission or with this issue in general—and if it had anything to do with their hopes on the war on terror abroad, rather than hopes here at home. Also, why are we not seeing this coming out in the candidacy and the run for the election, and would it help?

JOHN C. FORTIER: When we issued our report, we not only handed our report out and had some substantial meetings with all the congressional

leaders, but we also met with Dick Cheney, who as Vice President, also serves as president of the Senate. I think there is an interest in the executive branch, as Cheney is someone who is very interested in continuity issues since his days as White House Chief of Staff in the Ford Administration. That being said, it's not really the administration's fight. This is a congressional issue and I don't think any administration would want to be directly involved in this. As our Commission moves toward issuing a report on Presidential succession, we will meet with those in the administration interested in this. I think the Bush Administration is very interested in preserving continuity along Presidential lines of succession.

NORMAN J. ORNSTEIN: They're interested. However, it has been interesting to see that even among those at the very highest levels who are very much aware of the wall, the precedence, and the problems, they have not yet gotten engaged in a public fashion. As a result, we have not had the President in his State of the Union message when he discusses terror and how it has raised issues of continuity weighing in and saying I urge Congress to reconsider Presidential succession. That simply has not happened, nor have we had public pronouncements from anybody else at this point in the White House. Mr. Ho, have you had any conversations with them? Have they expressed an interest? Have they weighed in, in any fashion?

JAMES HO: I would predict that the DOJ and the White House would say that, regarding continuity of Congress, they don't regard it as their fight. They are not going to get involved at all. They will let us figure the issue out, and presumably the President would sign whatever legislation is sent up. On Presidential succession there is obviously more of an interest, but what they exactly end up doing, if anything, is far from clear.

*Question:* Is it decidedly unconstitutional for a state to elect in advance vacancy replacement members who would take seats in the event of a vacancy?

JOHN C. FORTIER: I would think so, since the Constitution says that there is one House method of filling vacancies and that's by having special elections. To have the election in advance there would be no vacancy to start the special election process. There is the case where members of Congress have issued their resignation letters in advance—they say I am going to resign on X date. This seems to be a little bit dubious because a member of Congress probably could pull back that resignation letter. But sometimes this notice in advance of resignation allows states to hold primaries for the vacancy before the seat actually becomes vacant. The general election couldn't happen before the member resigns, but some of the primary processing in some of these states have actually gone forward with the understanding that the representative is going to resign on future dates.



RANDOLPH D. MOSS: That strikes me as correct, as the Constitution also says that the House of Representatives shall be composed of members chosen every second year by the people in several states. Choosing members in advance strikes me as inconsistent with that constitutional text as well.

HOWARD WASSERMAN: One of the things that I propose in my written submission is the idea of what one of my colleagues called a "political advance directive," or "political living will," and it would apply only to the situation of incapacitated members. It would be a way to cap the period that either that incapacitated seat is excluded from the quorum, or that we have an acting member in that seat. It basically would be a written statement from the member that if an attack occurs and she is incapacitated by a set date, a number of days after the attack, she resigns the vacant seat, and in the meantime we could be planning an election. That might shorten the procedural time frame somewhat.

RANDOLPH D. MOSS: That strikes me as having constitutional legitimacy, as it is quite plausible in the same way you could have a Justice on the Supreme Court or a member of Congress resign conditionally as well, stating, I hereby resign upon the qualifications of my successor, which they've done quite frequently. Historically, I don't see the choice or analytical difference between that and someone saying I resign on the condition that I'm incapacitated in the following way and the successor is then chosen.

HOWARD WASSERMAN: Remember that a state may hold an election whenever it wants, but ultimately, the question is whether or not Congress will judge that member qualified, and if Congress determines that in fact there was no vacancy for this person to fill, then the person doesn't have the right to the seat.

JAMES HO: I wonder if Mr. Wasserman's proposal is in fact analogous to Mr. Moss's reference to resignation upon the qualification of a successor. In the latter case, that's a clear objective standard, so the question becomes what it means to be incapacitated and does the determination of that constitute a delegation, an impermissible delegation. I would worry about that.

RANDOLPH D. MOSS: You are right. I think it's a very fair question. If someone were to do this, it should be done in some objective fashion if possible.

HOWARD WASSERMAN: Or could we just leave it to the individual? Although I believe we'll get to that later.

*Question:* Is there currently some kind of mechanism in place—let's say that a congressman is in a coma after some kind of catastrophe and it doesn't look like he is ever going to regain consciousness—is there some

kind of mechanism where the rest of the House can basically declare him unqualified or unfit to sit?

JOHN C. FORTIER: There is one somewhat obscure precedent on this and it's limited, I believe. There's never been a member of Congress who has come and taken his or her seat in that particular term and then been declared incapacitated by the Congress. There have been a number of people who have been in comas for significant amounts of time in the Senate. But there was a case—Gladys N. Spellman, a Maryland Congresswoman who was campaigning for re-election. She had a massive heart attack and went into a coma before the election. She was then elected by the people even though she was incapacitated. However, when she was unable to take her seat in the following Congress, several months later, then the House said this seat is vacant because she wasn't able to claim her seat. So it's a somewhat limited precedent if you try to expand it to the case of a member who had already claimed his or her seat, it would certainly be a broader issue in that respect.

RANDOLPH D. MOSS: The constitutional text on this is also fairly broad. It says that each House may determine the rules of proceedings, punish members for disorderly behavior, and by the concurrence of two-thirds, expel a member. Now it may be that you read that language to mean that it's only for misconduct that the House would have the authority to expel. You might read the language to simply say that for some good cause on the vote of two-thirds, a member can be expelled. For example, inability to discharge his duties.

JOHN C. FORTIER: This Spellman case was actually done by a majority so that would have been different. But yes, you could have that interpretation.

HOWARD WASSERMAN: The Supreme Court's interpretation has been that a House can expel a member for any reason, as long as it has two-thirds. The problem you get into if we are dealing with a large number of comatose members is that if we can't get a quorum to do business, we can't get a quorum to expel.

NORMAN J. ORNSTEIN: And in the case of Spellman, whose attack was so massive that it was clear that she would not recover, members agonized over whether to expel her and decided for a whole host of reasons, including humanitarian reasons, that they would just wait until she couldn't show up to be sworn in. But we had many other instances of individual members who were clearly unable to serve for lengthy periods of time. Senator Karl Mundt, for example, was in a coma. Generally speaking, the attitude of both Houses is I think you got one out of a hundred—it's no big deal—and you just let it ride until you have an election or if you have two or three out of a hundred. However, it's a very different matter when you have a whole lot more, but there is going

to be a great reluctance on the part of members to have precedence set for the expulsion of members for incapacitation because it could be used for political purposes. In some instances, an incapacitation that some may believe will go on for a very long period of time might not. Imagine the circumstances if you get into the nightmarish situation where somebody has been elected, but because they were unable to serve for a period time they were expelled, but now they come back and are ready to serve. This is not something most members would ever want to contemplate, so we have to turn to other mechanisms if we are going to deal with larger numbers.

MODERATOR JUDGE UGAST: Well, this has been an extraordinary morning in terms of accomplishing the objective of helping us learn more about what's presently being done to implement continuity procedures in the event of a crisis. Additionally, we were able to hear proposals and discussions of what is ahead and may well become both the necessary legislation and/or the constitutional amendments to meet this very important need. So on behalf of the Law School and the Law School community, I want thank each of you all for giving of your time and being here with us this morning and helping us to learn more about these issues and what's ahead for us. We are truly grateful, and I do thank you all.